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STATEHOOD

FOR

NEW MEXICO.

ARGUMENTS ON BEHALF

OF

New Mexico's Admission into the
Union and in Defense of the
Territory's Inherent Right
to the Waters of Her
Streams.

The Committee on Territories,
House of Representatives.

NATHAN E. BOYD, M. D.



Class F801

Book 309

PRESENTED BY

NEW MEXICO AND STATEHOOD.

Admission Into the Union Essential to
Territory's Material Progress.

ANALYSIS OF CULBERSON-STEPHENS BILL.

PROPOSED TREATY WITH THE UNITED STATES
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Abstracts from the Decisions of the Supreme Court of New Mexico in
the Elephant Butte Dam Case; with Citations from the
Laws of the United States Relating to the
Use of Water for Irrigation.

NATHAN E. BOYD, M. D.



WASHINGTON, D. C.

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1902.

“IN THE ARID REGION IT IS WATER—
NOT LAND—WHICH MEASURES PRODUC-
TION. . . .

“The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi valleys brought prosperity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent western competition with eastern agriculture. *Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would otherwise not come into existence at all.* Our people as a whole will profit, for successful home-making is but another name for the upbuilding of the nation.”—President Roosevelt’s *First Annual Message to Congress*, December 3, 1901.

13 Oct. 1913. W.O.W.

NEW MEXICO AND STATEHOOD.

EL PASO INTERNATIONAL DAM PROJECT A GRAVE MENACE TO NEW MEXICO'S FUTURE.

VAST INTERESTS WILL BE DESTROYED IF THE USE
OF THE WATERS OF THE RIO GRANDE FOR
IRRIGATION IN NEW MEXICO
BE INHIBITED.

DR. NATHAN BOYD'S ADDRESS, ON BEHALF OF STATEHOOD
FOR NEW MEXICO, BEFORE THE COMMITTEE ON TERRI-
TORIES OF THE HOUSE OF REPRESENTATIVES.

*To the Committee on Territories,
House of Representatives, Washington, D. C.*

GENTLEMEN: In accordance with the request of your Chairman, I herewith submit for your consideration a formal statement embodying the substance of, and in some respects supplementing, my remarks when I had the honor of addressing you at yesterday's meeting on the subject of Statehood for New Mexico.

The Hon. B. S. Rodey, M. C., and the several members of the New Mexican Statehood Delegation, have described so fully New Mexico's many and varied sources of wealth that it is unnecessary for me to enlarge upon the fact that the territory has been long entitled to admission into the Union; that she now holds first place in the production of wool, and is a good second in the raising of cattle; that her mineral and timber wealth are vast in extent and are being developed rapidly; that we have a population of over 300,000 law-abiding industrious people, more than 90 per cent.

American born: that at the last general election more than 50,000 voters were registered; that in proportion to population we have a greater railway mileage, and support within our borders more banks, national and territorial, showing a larger ratio of deposits to capital stock, than any other state or territory; that we have property to the value of over \$300,000,000 taxable for the support of a state government; that we have more money per capita invested in public buildings and in public and other educational institutions than any other state or territory west of the Mississippi; and that we annually expend more per capita for education than any other state or territory in the Union. All this, and the fact that for more than fifty years our people have been handicapped by a territorial form of government when fully entitled to Statehood, have been presented in detail for your consideration.

Therefore, I have mainly confined my arguments to the importance of Statehood in relation to New Mexico's agricultural interest; for no matter how great her other sources of material prosperity may be, the cultivation of her irrigable lands must forever remain her greatest and most certain source of wealth—*provided always her people be not deprived of their right to utilize for irrigation purposes the flood waters of the Rio Grande and its tributaries.*

The hydrographic condition of New Mexico is such that the waters of the Rio Grande and its tributaries constitute her most valuable asset. Statehood will safeguard her right to impound the flood waters of her streams, and by ensuring protection for her farmers, contribute to the development of her other industries.

IRRIGATION CONDUCTIVE TO SOCIOLOGIC BETTERMENT.

History has shown that the highest forms of civilization the world has ever known were the outcome of physical conditions that rendered irrigation imperative. Where irrigation is practised, small holdings and intense cultivation obtain; a condition constituting a happy combination of town and country life, and favorable to the development of the noblest social institutions. In the Egyptian Valley of the Nile, there are only about 5,000,000 acres of land under cultivation—every acre of it irrigated; and, as a result of irrigation, Egypt has been a landmark in the world's history for thousands of years. In the Rio Grande Valley in New Mexico, as in the Valley of the Nile in Egypt, the irrigable lands have a great potential value. The highest priced and most productive farms on

this continent are in districts where irrigation is practised ; and the largest yield known of nearly every staple crop has been obtained in the Rio Grande Valley by irrigating with the fertilizing water of the Rio Grande—the “American Nile.”

The United States annually produces more precious minerals than any other country in the world ; but the annual value of the wheat crop of Minnesota alone largely exceeds in value the annual output of all the gold and silver mines in the United States. Colorado leads all the states of the Union in the production of precious metals ; but there are several hundred thousand acres under irrigation in Colorado, and the value of the products of her farms is nearly double that of her mines.

New Mexico also is rich in mineral wealth. Valuable and productive mines have been long worked in the territory ; and having regard to the geologic formation, it is safe to assume that Nature’s distribution of precious minerals extends with equal prodigality southward through New Mexico. But, be the mining possibilities of New Mexico never so great, the fact remains that if her people are not deprived of their justly inherent right to impound and appropriate for irrigation purposes the flood waters of her streams, her farms inevitably must become her chief source of prosperity, and in the relatively near future add many millions of dollars annually to the agricultural wealth of the American Nation.

Unhappily, we are in grave danger of being despoiled of our right to the waters of our catchment area ; and if we are wrongfully deprived of the use of the flood waters of our streams, the farming interest of our people is doomed, and we must remain for all time dependent upon neighboring states for the bulk of our food supplies. Hence, gentlemen, the importance of Statehood ; for once admitted into the sisterhood of states, New Mexico’s right to the waters of her catchment area will be as unassailable as is that of Colorado and the other arid states to the waters of their non-navigable streams.

In New Mexico, the annual rainfall is so slight that farming is practically impossible without irrigation ; but we have several million acres of rich alluvial land of unsurpassed fertility, irrigable from the Rio Grande and its tributaries. Medical experts have pronounced the climate of New Mexico to be unequalled on the American continent, taking it the year round ; our fruits and cereals secured first prizes at the Chicago World’s Fair and at the Paris Exposition ; our farms and orchards are from 1200 to 1500 miles nearer to the

great eastern markets than are those of California, and our fruiting season, especially in the southern part of the territory, is from four to six weeks earlier.

I mention these facts, gentlemen, merely to emphasize the great importance of the vast interest which Statehood for the territory will safeguard. Our people consider Statehood of vital importance to their welfare; for without Statehood, our territorial water rights will remain in jeopardy, and we shall not be able to command capital for the development of our irrigable lands.

"ELEPHANT BUTTE DAM" A PUBLIC UNDERTAKING OF IMMENSE IMPORTANCE TO NEW MEXICO.

For more than a quarter of a century, our people looked to Congress for financial assistance in storing the flood waters of the Rio Grande; and whilst we have not altogether abandoned hope of some day receiving some form of national aid for the development of our arid lands, with an energy characteristic of the West, we have demonstrated that, with or without Federal assistance, we are quite capable of financing and carrying out a great irrigation undertaking, so long as our right to appropriate the flood waters of our streams is not threatened by Congress.

The normal flow of the Rio Grande has been used, more or less, for irrigation in New Mexico since the Spaniards first founded colonies in that part of "New Spain" over 300 years ago; but the system of irrigation practised is but a primitive one at best, and is carried on chiefly by means of "community ditches." No attempt was made to impound the flood waters of the Rio Grande by building great storage dams until 1893, when, despairing of Federal aid, a public company was incorporated under the laws of the territory for the purpose of building a storage dam at Elephant Butte, in Sierra County, and irrigating the valley and mesa lands below as far as Fort Quitman, Texas. All the requirements of the territorial and federal statutes were complied with in order to establish the reservoir rights essential to the undertaking; and the land-owners in the Valley, almost without exception, entered into formal contracts conveying to the Company part of their lands and transferring to the Company their rights in the existing "community ditches," thus creating a valuable property basis for the necessary bond issue.

Finding it impossible, in the then condition of the money market

in this country, to raise, at anything but prohibitive rates, the large amount of capital required to carry out the proposed works, and being largely interested in the undertaking personally, I went abroad with a view to placing the Company's debenture bonds in Europe. Unfortunately, the mistrust of American industrial securities, especially of irrigation securities, had become so universal that, notwithstanding large sums were expended in properly presenting the enterprise to capitalists, none would risk investment, although all admitted the obvious merit of the undertaking.

In England, the directors of a public company, individually and collectively, are responsible to investors for good management; and finding that foreign investors would be more likely to entrust their money to an English board of directors, an English Company was formed (by my personal friends) to issue 8 per cent. preference shares and 5 per cent. debenture bonds, the former at par and the latter at a premium of 5 per cent., to be secured by a lease of the American Company's undertaking. An exceptionally influential board, the members of which invested extensively in the enterprise, was secured, and largely upon the strength of the high rank and representative character of the members of the English Directorate, the necessary capital was underwritten and subscribed—subject to calls to be made from time to time, as needed.

Col. W. J. Engledue, R. E., an eminent authority on irrigation engineering, who was for many years identified with the Imperial irrigation works in India, visited the Rio Grande Valley on behalf of the English investors, and carefully investigated the engineering features of the undertaking and the rights and titles of the American Company. Work on the proposed dams and canals was begun: a great colonization system was organized: branch offices and agencies were established in Great Britain and on the Continent; an immense amount of printed matter (in English and French) descriptive of the climatic and other advantages offered to settlers in the valley and of the resources of the territory was widely circulated; and contracts for the sale of large blocks of land for fruit and vine culture were made, the Company undertaking to provide water within two years.

Lands in the Rio Grande Valley, irrigable from the Company's system of canals, previously worth but little more than a few dollars per acre, rapidly appreciated in value, large blocks being contracted for by subsidiary companies and sold to settlers at \$100 an acre. Widespread interest in the enterprise in particular, and in the re-

sources of the territory in general, was aroused both in this country and in Europe; and thousands of applications for land were being received at the London Office, when, without a word of warning, the then Attorney General (1897), at the instigation of the promoters of the "international dam" scheme, instituted proceedings with the avowed intention of invalidating the Company's rights and of confiscating the valuable works that were in course of construction.

AN OFFICIAL CRIME.

For nearly ten years, certain parties in Old Mexico and Texas, interested in lands just below our southern boundary, have been scheming to have the Federal Government inhibit the use of the flood waters of the Rio Grande and its tributaries for irrigation above El Paso; and in the absence of any legitimate ground for legal proceedings against the Rio Grande Dam and Irrigation Company, the action instigated as above was based upon the preposterous allegation that the Company's works would interfere with navigation in New Mexico. Such was the alleged ground for the attack upon our territorial water rights: but our enemies made no attempt to disguise the fact that the real object was to reserve the whole of the flood waters of the Rio Grande in New Mexico for the proposed "international dam" to be built at El Paso, Texas. The absurd contention that the construction of storage dams in New Mexico would interfere with navigation above El Paso was soon abandoned, the suggestion that the Rio Grande is navigable in New Mexico being ridiculous in the extreme. But the action was continued on the ground that our use of the waters of the Rio Grande for irrigation in New Mexico would seriously affect the "navigable capacity" of that River some 1200 miles or more below (measured by its sinuosities); where the alleged "navigation" is represented by one old stern-wheeler of about eighteen inches draft, which during a few months in the year, occasionally succeeds in "navigating" with much travail the sand bars and shallows between Brownsville and Rio Grande City, 170 miles above the mouth of the river.

At first, our people treated the action as a huge joke, believing, of course, that so soon as the true characteristics of the Rio Grande were made known, through the medium of the court, to the heads of the departments here at Washington, the suit would be abandoned; for, manifestly, the impounding of the flood waters of the

Rio Grande, and their distribution over the land by means of irrigation ditches, would improve the normal flow of the river below.

It is a well-established fact that the use of the flood waters of torrential streams for irrigation invariably improves the normal regime of the stream below the district irrigated. This has been demonstrated in Colorado, where practically the entire flow of the headwaters of the Rio Grande is appropriated for irrigation in the San Luis Valley, also in other parts of the arid west, in Europe and in India. Professor L. G. Carpenter, of the U. S. Agricultural College at Fort Collins, Colorado, has made a thorough study of this question, and has shown that, despite the fact that practically the whole of the water of the Rio Grande in Colorado is diverted for irrigation, the normal flow of the stream below, where it passes into New Mexico, has been improved rather than diminished.

But notwithstanding the well-known facts that were presented to the trial court, which decided that the Rio Grande is not navigable within the meaning of the law, and that "the soil of New Mexico is not burdened with a servitude in favor of the Republic of Mexico," the Government appealed. The action was dragged on from year to year by the Government appealing again and again; and it has now become unmistakably evident that the suit has been maintained, not in the interest of navigation some 1200 miles below, but in the interests of the "international dam" project. In other words, New Mexico—the "Cinderella" of the United States—is to be deprived of practically her sole source of water supply for agricultural purposes, her most precious heritage; in order that the proposed "international dam" at El Paso may lay claim to the whole of the flood waters of the Rio Grande and its affluents in New Mexico.

Now we, in New Mexico, do not care how many "international" dams are built below our southern boundary, provided always that we, above El Paso, are not restricted from impounding and using for irrigation and mining purposes the waters of our catchment area. We do not seek, nor do we desire, to restrain Colorado from appropriating the headwaters of the Rio Grande—waters of her catchment area; and we maintain that we, in New Mexico, are equally entitled to the waters of our catchment area.

THE RIO BRAVO DEL NORTE NOT NAVIGABLE.

The Rio Grande is not a navigable river in New Mexico, nor is it navigable for over 1200 miles below our southern boundary; and conclusive proof has been submitted in the courts that—even under existing conditions, without storage dams—our torrential floods do not reach the so-called head of navigation in substantial quantities; *i. e.*, in sufficient amount to improve materially the “navigable capacity” of the stream. It is a matter of record that the great floods that pass down the Rio Grande in New Mexico in the spring and autumn do not affect substantially the flow of the stream below the alleged head of navigation; the waters of the lower Rio Grande coming chiefly from the Rio Pecos and a number of Texan rivers, and from the Rio Conchos, the San Juan and other confluent streams having their sources in the mountains of Old Mexico. Reports on file with the Geological Survey show that the rivers tributary to the Rio Grande below El Paso drain an immense area, 170,000 square miles as compared with a watershed of 25,000 square miles above El Paso; and that the water supply below El Paso, allowing for the larger drainage area, is proportionately very much greater than the water supply above. New Mexico is essentially an arid country, and its waterways are all torrential except the lower Pecos: whereas, below El Paso, many of the principal Rio Grande confluents are permanent streams; the Rio Conchos, San Juan, Salado, Alamo and others have their sources in the lofty mountain ranges of Old Mexico and flow through a country where exceptionally heavy semi-tropical rains frequently fall during certain periods of the year.

Professor Robert T. Hill, of the Geological Survey, has been engaged for nearly fifteen years in making an official investigation of the basin of the Rio Grande, and in one of his reports he states that “*the Conchos is the mother stream of the Rio Grande and brings the first permanent water into the main river.*” He declares that the river designated on our maps as the Rio Grande actually consists of three streams: the “Rio del Norte,” rising in southern Colorado, flowing south through New Mexico, bisecting that territory; the “Rio Bravo,” practically a continuation of the Rio Conchos (the so-called main stream above the mouth of the Conchos being shown on Professor Hill’s map by a dotted line only, as far north as San

Marcial, New Mexico); and the "Rio Grande," from the mouth of the Pecos to the Gulf.

NEW MEXICO ALARMED.

The people of New Mexico now fully recognize the great importance of the issue at stake in the action to which I have referred. Both the Republican and Democratic parties introduced planks in their platforms deprecating the attempt to deprive the land-owners of the Rio Grande Valley above El Paso of their right to impound the flood waters of the river for the irrigation of their lands. Various bodies throughout the Territory—boards of trade, chambers of commerce, commercial clubs, and so forth—have passed resolutions, which have been forwarded to the Department of Justice, the Secretary of State, and to other authorities, praying that the proceedings against the Rio Grande Dam and Irrigation Company be dropped, or brought to an early and final hearing. A petition was circulated throughout the Territory, and was signed by practically all of our representative men—land-owners, farmers, merchants, professional men, public officials, and others—praying the Federal Government not to destroy the farming interest of the Territory, and pointing out that:—

"Under the direction of the U. S. Government, federal officials had investigated the Rio Grande, and Major O. H. Ernst, in his report to the Secretary of War, 1899, had declared that the Rio Grande 'is not navigable, and cannot be made so by open channel improvement.'

"The U. S. Government has established a notable precedent by conserving the headwaters of the Mississippi for the express purpose of improving the low water navigation of that river.

"Authentic historical records show that irrigation has been practised along the Rio Grande in New Mexico for over 300 years; the law of prior appropriation existed under the Mexican Republic at the time New Mexico was annexed to the United States; and one of the first acts of the U. S. Federal Government was to declare that 'the laws heretofore in force concerning water-courses . . . shall continue in force.'

"Congress, by reservation and survey of reservoir sites on the Rio Grande in New Mexico, and by the appropriation of large sums of money for such surveys, has clearly indicated its purpose to treat the waters of the Rio Grande as suitable for irrigation only.

"The Government having surveyed and selected reservoir

sites on the Rio Grande, which subsequently were thrown "open to private and corporate location; and Government experts having declared the Rio Grande to be non-navigable in New Mexico, manifestly it was not necessary for the Rio Grande Dam and Irrigation Company (its plans had been formally approved by the Secretary of the Interior) to apply to the Secretary of War for permission to impound the flood waters of the Rio Grande at Elephant Butte."

Further, year after year, Governor Otero, in his "Annual Report to the Secretary of the Interior," has declared in explicit terms that:

"The greatest setback New Mexico has ever had was that resulting from the stoppage of work on what was familiarly known as the Elephant Butte Dam . . . for with the completion of this work will blossom forth one of the richest agricultural, fruit and dairy sections in the West."

• Last session of Congress, Governor Otero (in his protest before the Senate Committee on Foreign Relations), speaking of the attempt that was then being made to pass a bill prohibiting irrigation enterprises in New Mexico, urged that New Mexico's "helplessness in the national councils should be her most potent argument for protection." He also said:

"We, perforce, bow with submission to the will of Congress, but we cannot find words sufficiently strong with which to protest against the attempt to prohibit the construction of reservoirs upon our principal stream and to deprive our people of the use of even the limited waters at our hand for the purposes of agriculture."

Mr. Chairman and Gentlemen of the Committee, we of New Mexico warmly support the admission of Oklahoma and Arizona as states, but we maintain that so long as our most valuable asset is threatened by such bills as those introduced year after year in behalf of the proposed El Paso dam, our claim for Statehood is of paramount importance.

Yours obediently,

NATHAN E. BOYD, M. D.

FEBRUARY 8, 1902.

CULBERSON=STEPHENS BILL.

S. 453.

H. R. 115.

NEW MEXICO'S FUTURE THREATENED BY EL PASO "INTERNATIONAL DAM" SCHEME.

ANALYSIS OF BILL.

*To the Committee on Territories,
House of Representatives, Washington, D. C.*

GENTLEMEN: Mr. Stephens of Texas, when addressing you on Saturday *in re* his bill H. R. 115 (57th Congress—1st session), attempted to disprove my assertion, when I appeared before you on Friday last, that his bill, or any similar bill, if passed, would be unjust and vicious in its effect, as well as inevitably fatal to the farming interest of the people of New Mexico. I do not presume to question Mr. Stephens' good faith in the premises (doubtless the parties who are really responsible for the bill have misled Mr. Stephens as they have misled others); but I crave your permission to submit for your consideration the following analysis of his bill, which I am emboldened to say cannot fail to prove to you that Mr. Stephens is in error when he says that "his bill merely provides for an equitable distribution of the waters of the Rio Grande, and is not intended to inflict injury upon the people of New Mexico."

Mr. Stephens made a point of emphasizing his statement that the bill in question "is the direct outcome of congressional action." By this, I take it, Mr. Stephens refers to the Concurrent Resolution dated April 29, 1890 (51st Congress—1st session), which reads as follows:

“ CONCURRENT RESOLUTION

“ Concerning the irrigation of arid lands in the Valley of the Rio Grande River, the construction of a dam across said river at or near El Paso, Texas, for the storage of its waste waters, and for other purposes.

“ Whereas the Rio Grande River is the boundary line between the United States and Mexico, and whereas by means of irrigating ditches and canals taking the water from the said river, and other causes, the usual supply of water therefrom has been exhausted before it reaches the point where it divides the United States of America from the Republic of Mexico, thereby rendering the lands in its valley arid and unproductive, to the great detriment of the citizens of the two countries who live along its course; and

“ Whereas in former years annual floods in said river have been such as to change the channel thereof, producing serious avulsions and oftentimes and in many places leaving large tracts of land belonging to the people of the United States on the Mexican side of the river, and the Mexican lands on the American side, thus producing a confusion of boundary, and disturbance of public and private titles to lands, as well as provoking conflicts of jurisdiction between the two governments, offering facilities for smuggling, promoting the evasion, and preventing the collection of revenues by the respective countries; and

“ Whereas these conditions are a standing menace to the harmony and prosperity of the citizens of said countries, and the amicable and orderly administration of their respective governments; therefore

“ *Resolved by the Senate (the House of Representatives concurring)*, That the President be requested, if, in his opinion, it is not incompatible with the public interests, to enter into negotiations with the Government of Mexico with a view to the remedying of all such difficulties as are mentioned in the preamble to this resolution, and such other matters connected therewith as may be better adjusted by agreement or convention between the two governments.

“ The President is also requested to include in the negotiation with the Government of Mexico all other subjects which may be deemed to affect the present or prospective relations of both governments.”

I enclose, for your consideration, copy of Mr. Stephens' bill (H. R. 115); and I would point out that while the above-quoted Concurrent Resolution is obviously the basis of the bill, it is equally obvious that the resolution, like the bill itself, is the “ outcome ” of an

attempt to deprive the people of New Mexico of their right to utilize the waters of their catchment area, and manifestly has emanated from the same source; namely, the promoters of the "international dam" project—certain of Mr. Stephens' constituents in the city of El Paso, Texas, and their associate speculators in lands on the Mexican side of the river immediately below El Paso and in the large block of land that would have to be condemned for reservoir purposes if the proposed "international dam" be built. *The people of El Paso favor the Elephant Butte dam.*

In my address before you on Friday, I stated that the attempt to deprive New Mexico of her water rights began over ten years ago; and in making the statement I especially had in mind the Resolution above quoted. As this Resolution is the only authority for the large expenditures since made to determine if it be feasible to construct a storage dam at El Paso, and as it has been the basis of the various measures that have been proposed with a view to legislating out of existence New Mexico's right to the flood waters of her streams, it is proper to examine it somewhat critically.

In the first place, it will be observed that in the Resolution the only reference to the building of a dam across the Rio Grande is contained in the title to the Resolution. The building of a dam is not again mentioned, either in the preamble or in the body of the Resolution.

The first clause of the preamble declares in substance that by means of irrigating ditches and canals taking water from the Rio Grande (in the State of Colorado and in the Territory of New Mexico), the flow of the stream has become so greatly diminished that the farmers living below the southern boundary of New Mexico, along the borders of the river in the State of Texas and in the Republic of Mexico, have been deprived of their usual supply of water for the irrigation of their lands. This statement, as I shall be able to demonstrate, is incorrect.

DROUGHT, NOT IRRIGATION, CAUSE OF DIMINISHED FLOW.

Irrigation in Colorado and New Mexico has not materially diminished the flow of the Rio Grande at El Paso. Prior to 1880, there was relatively but little irrigation practised along the Rio Grande in Colorado; and there has been no large increase of irrigation in New Mexico within the past thirty years. To the contrary, according to Mr. W. W. Follett, the Engineer to the United States International (Water) Boundary Commission specially deputed by the United

States Government to investigate the flow and characteristics of the Rio Grande and the question of Rio Grande irrigation generally, there has been a considerable decrease in the area irrigated in New Mexico within the past ten years. In his official report, Mr. Follett says that the total area now irrigated in New Mexico is only about 190,000 acres, and adds that :

“A large percentage of the irrigation is ancient ; over 75 % of it dates back to 1860, while 20 % or 30 % of it is of unknown age, but over 100 years old. . . .

“The use of water for irrigation in New Mexico is not the cause of this decreased flow”—at El Paso.

Referring to the use of the waters of the upper Rio Grande for irrigation in Colorado, Mr. Follett says :

“In 1879 the use of the water had there extended to the irrigation of 122,000 acres. . . . This area increased steadily up to 1890. . . . The next two years saw a large increase, over 350,000 acres being watered in 1891, and nearly 400,000 acres in 1892.”

Now we have official reports, made by Government engineers and experts, which show that the use of the flood waters of the upper Rio Grande for irrigation in Colorado has *improved* the normal regime of the stream below, where that river passes into New Mexico. If the utilization of the flood waters of the Rio Grande for irrigation in Colorado improves the flow of the stream below the districts irrigated, it logically follows that a like utilization of the waters of the Rio Grande and its tributaries in New Mexico will also tend to improve the normal flow of the stream below, say where the river first becomes the boundary line between Texas and the Republic of Mexico.

I do not deny that within the past ten years the normal flow of the Rio Grande at El Paso has been somewhat less than it was during certain of the more favorable years prior thereto. But the reason for the diminution in flow is a matter of historic record. All of New Mexico, and the greater part of western and southern Texas, have for the past ten years or more suffered from severe drought, so extensive in fact that vast cattle interests have been destroyed ; many thousands of acres of irrigated lands have gone out of cultivation in New Mexico, in Texas, and in the Mexican States of Chihuahua and Coahuila ; and many of the Rio Grande tributaries, formerly perennial in character, have become purely

torrential streams in consequence of and during the period of the drought. Within the past two years there has been a break in the drought, the annual precipitation having increased, and several of the streams in question are again becoming perennial.

General Anson Mills, Director of the United States International (Water) Boundary Commission, chief promoter of the "international dam" project, says in one of his reports that "*from personal observation I know that these seasons of flood and drought were of about the same character thirty years ago*" (Major Anson Mills, 10 U. S. Cav., Rep. Spec. Com. Sen., Vols. 3 and 4, p. 39). It is significant that the report just quoted was made many years ago, long before the inception of the Elephant Butte Dam enterprise. More recently, it has suited General Anson Mills's purpose to maintain that "forty years ago there was comparatively an abundance of water in the river and that it seldom went dry"—*vide* his sworn statement dated June 23, 1897.

As a matter of fact, there is ample authentic evidence to show that these periods of drought have occurred from time to time since the river first came under the observation of the early Spanish and subsequent American settlers. Overwhelming proof, taken from official records, could be cited in support of my argument that irrigation in Colorado and in New Mexico is not, to any marked degree, responsible for the diminished flow of the Rio Grande at El Paso. But, for obvious reasons, it is preferable to give as my authority reports emanating from the promoters and supporters of Mr. Stephens' bill.

General Anson Mills has stated in one of his numerous letters to the Secretary of State that "*there was, prior to 1880, a great scarcity of water in the Rio Grande at El Paso*;" and as I have already shown by Mr. Follett's report, there has been no increase of irrigation in New Mexico for many years. Again, according to Mr. Follett, the bulk of the irrigation in Colorado "rapidly increased from 1880 to 1890, over 350,000 acres being watered in 1891, and nearly 400,000 acres in 1892." Yet the great scarcity of water at El Paso was a matter of record *prior* to 1880—according to General Anson Mills, and official records show that the scarcity of water *since* 1880 is accounted for by the prolonged drought.

Parenthetically, it may be remarked however, that so far as General Anson Mills's evidence is concerned, it loses somewhat in value when it is known that he has stated in an affidavit dated June 23, 1897, that "the Rio Grande could be navigated by steamboats for

“hundreds of miles both above and below El Paso, Texas.” Comment upon this very remarkable statement is superfluous, further than to marvel at the audacity evidenced by the utter disregard it shows for the law making perjury a criminal offence.

It was by means of General Anson Mills’s official, *and supposedly reliable*, reports as to the “navigability” of the Rio Grande in New Mexico that the Federal Authorities were seduced (I use the word advisedly) into instituting proceedings in the courts some five years ago enjoining the construction of storage dams on the Rio Grande in New Mexico.

So much for the first clause in the preamble of the Concurrent Resolution above quoted!

INTERNATIONAL DAM BILL.

Coming now to the second clause of the preamble of the Concurrent Resolution, we find that it refers merely to the occasional changes in the course of the river where it forms the boundary line between the United States and Mexico.

Now upon these two clauses, the Resolution, like Mr. Stephens’ bill (the title and preamble of which are on the same lines as the title and preamble of the Resolution), is built up.

Attention is specifically called to this Resolution, first, because Mr. Stephens has obviously taken it as the basis for his bill; and second, and chiefly, because its bungling terms evidence that it had its inception with parties not properly connected with Congress, or familiar with the making of laws, and therefore not with Mr. Stephens. Doubtless, the tyro in legislation who drafted the Resolution had in mind the authorization of a treaty to provide for an “international dam.” But usually such authorization would not be looked for in the title of the Resolution only; and the authoritative part is to be found only in its preamble, and where such preamble is indirectly referred to and made part of the resolution proper. From any point of view, this resolution must be considered unique and altogether *sui generis*; for, taken by itself and analysed, certainly it cannot be regarded as a proper authorization either to construct an “international dam” at El Paso, or to make expensive surveys to ascertain whether such a dam could be constructed.

It will be noted that in the third clause of the preamble of Mr. Stephens’ bill, it is proposed by the Government of Mexico and the Government of the United States that the alleged deficiency in the

flow of the Rio Grande shall be made good by impounding the flood waters of the river by means of an "international" dam and reservoir. But admitting, for the sake of argument, the expediency of building an "international dam" as a means of satisfying (Old) Mexico's preposterous claim against the United States, *why* should the people of New Mexico be deprived of their right to the waters of their catchment area? Does Mr. Stephens maintain that the people of New Mexico do not enjoy the same right to utilize the waters of the Rio Grande for the irrigation of their lands, as that enjoyed by the people of Colorado to utilize their waters for the irrigation of their lands? Apparently he does, if we may judge by the fact that in one of his previous "international dam" bills he sought to inhibit the impounding of the flood waters of the Rio Grande in Colorado as well as in New Mexico, while now the Territory only is threatened.

What greater proof is needed in support of the argument that, in regard to their constitutional rights, the citizens of New Mexico—a territory—are less fortunately situated than the citizens of Colorado—a state? The bill, if enacted, will not inhibit the further appropriation or the impounding of the waters of the Rio Grande in the State of Colorado—the prohibition is confined to the Rio Grande and its tributaries "in the Territory of New Mexico;" and it is hardly necessary for me to point out that if the people of New Mexico are now prohibited from any further use of the waters of the Rio Grande and its affluents within the territory, then the several millions of acres of irrigable lands between the Colorado line and El Paso, Texas, must for ever remain practically a useless waste.

But the supporters of the "international dam" project, who have so long schemed to deprive New Mexico of her right to the use of the waters of her catchment area, now know that they cannot invade a sovereign state with such legislation. Therefore, they have sought to rely upon the plenary power of the Federal Government over territories; they have invoked what they call the spirit of Article 7 of the treaty of Guadalupe Hidalgo; and they have instigated the filing of fictitious claims with the State Department by citizens of Mexico, claims set up under the so-called spirit of the said Article, amounting in the aggregate to over \$35,700,000,—all with a view to inducing Congress to deprive New Mexico of her right to impound the flood waters of her streams.

Mr. Stephens argues that his bill only provides for "the equitable

distribution of the waters of the Rio Grande;" and I assume that Mr. Stephens believes such to be the case. But the fact remains that although the estimated storage capacity of the proposed "international dam" is only 537,340 acre feet (*vide* Mr. Follett's report dated September 18, 1889), Mr. Stephens' bill, if the wording of it means anything, specifically inhibits the construction of storage dams on the Rio Grande or its tributaries in New Mexico. General Anson Mills, however, estimates that a dam 60 feet high (at El Paso) will submerge about 60,000 acres, and create a storage reservoir with a capacity of 108,000,000,000 cubic feet—2,419,338 acre feet (*vide* report to the Secretary of State dated September 10, 1888, see House Doc. No. 125, 54th Congress—1st session).

Clauses 4 and 5 of the preamble of Mr. Stephens' bill speak for themselves; and clause 6 improperly presupposes that the flow (of the Rio Grande) is insufficient for more than one reservoir.

The last clause of the preamble of the bill apparently is intended to justify the two sections of the bill, the first of which provides that—

"Nothing in the Acts of March 3, 1891, "January 1, 1895, February 26, 1897, and May 11, 1898 (Acts providing for and authorizing the building of storage reservoirs in New Mexico), shall be so construed as to authorize "the appropriation and "storage of waters of the Rio Grande or its tributaries in the "Territory of New Mexico to which others have right by "prior appropriation." Then follow certain stringent penalties, and the provision that the "unlawful appropriating and "storage of water in this Act mentioned may be prevented, "and the dam, reservoir, or other means used for impounding the water may be removed by the injunction of any "circuit court exercising jurisdiction in any district in which "said water may be appropriated or stored."

No amount of sophistical quibbling can obscure the patent purpose and certain effect of this bill. It provides in substance that the proposed "international dam" and reservoir shall constitute a priority right to the appropriation of the waters of the Rio Grande; that the building of all other dams and storage reservoirs on the Rio Grande above El Paso shall be "restrained;" that every person and corporation "appropriating and storing the said waters in this "Act mentioned shall be deemed guilty of a misdemeanor."

Mr. Stephens says that he leaves it to any unbiassed man that his

bill only provides for the equitable distribution of the waters of the Rio Grande. Gentlemen, I leave it to your unbiassed minds that Mr. Stephens' bill provides for quite the contrary, and evidences a deliberate purpose to take advantage of New Mexico's defenceless condition as a territory.

Admitting the maximum amount of land irrigable in the valley below El Paso, on both the Mexican and Texan sides of the river, to be 95,000 acres (*vide* Mr. Follett's report), although the investigation of the International Boundary Commission, of which General Anson Mills is chief, showed that approximately but 40,000 acres had been irrigated in the valley below El Paso (*vide* Senate Doc. No. 229, 55th Congress—2nd session); and allowing $1\frac{1}{2}$ acre feet per acre for each year's irrigation—which is fully $33\frac{1}{3}$ per cent. more than sufficient to provide an adequate supply of water: a reservoir of the capacity given by Mr. Follett, if only filled once during each year, would provide nearly four times as much water as would be necessary, even after making a liberal allowance for evaporation and seepage.

If, however, General Anson Mills's figures are taken throughout, viz., 40,000 acres irrigated in the valley below El Paso, requiring 1 acre foot of water per acre per annum (he says he "considers 12 inches will be sufficient"), the contemplated injustice to New Mexico becomes all the more glaring.

ALLEGED PURPOSE OF BILL.

The main object for which it is alleged the proposed "international dam" is intended, is to supply the farmers in the valley below El Paso with as much water as they have appropriated heretofore for the irrigation of their lands, and thereby to make good the United States obligation under its treaty with Mexico. Now, as already shown, the United States International (Water) Boundary Commission, of which General Anson Mills is chief, found that not more than 40,000 acres (our engineers put the total at less than 20,000 acres) had ever been irrigated in any one year in the valley below El Paso, consequently, as one acre foot of water per acre per annum is considered by General Anson Mills to be sufficient, and would be sufficient, the farmers in the valley below El Paso—Mexican and Texan—cannot justly lay claim to more than 40,000 acre feet of water a year for their lands, plus 25 per cent. at most to cover loss by evaporation and seepage, say 50,000 acre feet in all.

But General Anson Mills, in his extreme anxiety to do justice (?) to the Mexican and Texan irrigators in the valley below El Paso, regardless of the consequences to the farmers just above in New Mexico and to the rights of the people of the territory generally, proposes to build a dam 60 feet high, that will submerge for reservoir purposes 60,000 acres of valley land, 99 per cent. of it irrigable and in New Mexico (in order to provide water for 40,000 acres below, be it remembered), thus creating a reservoir which, if filled but once a year, will impound 108,000,000,000 cubic feet of water—2,419,338 acre feet—*more than sufficient to provide fifty times as much water as the 40,000 acres heretofore irrigated below could require or justly be entitled to receive.*

Verily an extraordinary proposition, to say the least. In fact, the more we look into the object of the promoters of the "international dam" project, the more "an unbiassed mind" must become convinced that Mr. Stephens' bill provides for something very different from "an equitable distribution of the waters of the Rio Grande."

But, with a fine disregard for the rights of the people of New Mexico, General Anson Mills proposes to utilize the surplus waters, to be impounded in the "international dam," for the maintenance of "a constant flow in the river below," and for "water motors to furnish power to the future manufacturing cities on each side," *i. e.*, on the Texan and Mexican sides of the Rio Grande below El Paso (*vide* House Document No. 125, 54th Congress—1st session).

Unhappy New Mexico! With an area of 122,580 square miles, equal to the combined areas of Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York and New Jersey, and with a present irrigated area not exceeding (*vide* Follett's report) 190,000 acres, she is to be denied the right to impound and appropriate any of the flood waters of the Rio Grande for the maintenance of her farming interest: merely in order that an "international dam" may be built at El Paso, appropriating the whole of the flood waters of the Rio Grande and its tributaries between Colorado and El Paso, Texas, for the irrigation of 40,000 acres of Mexican and Texan lands; for the maintenance of a "constant and unvarying flow of water in the river bed;" and for "water motors" to furnish "power to *future* manufacturing cities" on the Texan and Mexican banks of the Rio Grande—below El Paso.

And this is what Mr. Stephens calls "an equitable distribution of the waters of the Rio Grande!"

But the second section of the bill is not only to authorize the Sec-

retary of State to proceed with the consummation of the proposed treaty between the United States and Mexico; to cede a certain portion of the Territory of New Mexico to the Republic of Mexico (see proposed Treaty, Sen. Doc. 229); and to undertake the novel duty of building a dam: it also limits him to plans and specifications not set out in the bill. And surely it is unusual, not to say absurd, that Congress should be asked to authorize the Secretary of State to negotiate a treaty; for, needless to say, the Executive already has such power? Again, as a rule, dams are built by the War Department, not by the State Department; and a proposal to authorize the Secretary of State to proceed with the construction of said dam and reservoir is remarkable, if nothing more.

But I take it that neither the Committee to which Mr. Stephens' bill is referred, nor the House, will feel warranted in launching such a scheme, for such a purpose, at an expense of \$2,317,113.36 (Mr. Stephens is wonderfully circumstantial as to the cost of the proposed dam, notwithstanding the well-known engineering difficulties at the site proposed) without thoroughly investigating, first, New Mexico's rights in the premises, and second, the feasibility of building a dam at El Paso, where the Government engineers failed to find suitable bed-rock at even 95 feet below the bed of the river.

BILL WOULD DESTROY TERRITORY'S CHIEF SOURCE OF MAINTENANCE.

Generally speaking, the bill, if passed, would nullify the irrigation laws of New Mexico and the laws of the United States pertaining thereto; would inhibit the construction of a dam and reservoir at Elephant Butte, or at any of the dam sites surveyed by the Government and thrown open for public location on the Rio Grande in New Mexico; and would prohibit any further use of the waters of the Rio Grande and its affluents in any part of the Territory—thus for all time limiting irrigation in New Mexico to the present area under cultivation, viz., 190,000 acres, although by careful conservation of the flood waters of the Territory's catchment area, and their distribution for irrigation purposes, several million acres are irrigable. Further, the whole body of laws relating to the use of non-navigable waters for irrigation, founded upon definite and explicit statutes of the United States and upon decisions of the Supreme Court, would be swept aside. In fact, it would not only repeal and nullify statutes and customs of long standing, but

also, to quote Governor Otero, "it would deprive the Territory of "its chief source of income and its main dependence for existence." It would be a radical inversion of the existing irrigation laws; and in principle it threatens the business of irrigation throughout all the territories. If Congress may prohibit the use of the waters of the Rio Grande for irrigation in New Mexico, it may likewise prohibit the use of the waters of non-navigable streams in Arizona and in Oklahoma. The bill makes an invidious and indefensible distinction between the citizens of a state and those of a territory.

Therefore, the bill, and the policy responsible for it, are a standing menace to New Mexico, also to Arizona and Oklahoma; and I have discussed the matter at such length because I consider the grave danger threatened to be the most cogent argument in behalf of Statehood.

TERRITORY'S WATER RIGHTS PERSISTENTLY ATTACKED IN CONGRESS.

The right of the citizens of the Territory to impound the flood waters of the Rio Grande has been attacked not in the courts only (for five years the Federal Government has been seeking to enjoin the construction of a storage dam on the Rio Grande at Elephant Butte), but again, and again, and again, our enemies have attempted to destroy our water rights by Act of Congress; not only by means of bills similar to those introduced by Mr. Stephens and Senator Culberson, but from time to time by means of artfully worded riders tacked on to otherwise innocent non-contentious measures—riders which, if allowed to pass, would have rendered impossible any considerable increase of irrigation in New Mexico. For instance, "An act to permit the right of way through public lands for "tramroads and canals, and for other purposes," was amended as follows:

"None of the existing laws shall be so construed as to authorize the appropriation or storage of the waters of any stream or river, *state, interstate, or international*, to which others below have right by prior appropriation, or the obstruction or interference with the navigable capacity of such streams or rivers, and such appropriation or storage, obstruction or interference, is hereby prohibited."

Fortunately, the bill was brought to the notice of my attorney here, Mr. J. H. McGowan, and he secured its recall from the House.

But the friends of the "international dam" scheme were not to be so easily defeated, and later they succeeded in having the following amendment substituted :

"That the Secretary of War is hereby authorized to secure in the *State of Texas* the necessary lands on which to build a dam on the Rio Grande at or near El Paso in that State. No reservoir for the storage of water shall be built on the said river within the boundaries of the Territory of New Mexico without an act of Congress authorizing the same."

Here again, my attorney defeated the enemy by having the bill sent back to the Committee, where the amendment was dropped.

It is obvious from the above that so long as New Mexico remains a territory, and subject to the plenary powers of Congress, our water rights will be in constant danger of some form of congressional restriction; and that, with the history of the Rio Grande Dam and Irrigation Company in evidence, it will be practically impossible to find capital for storage dams and large irrigation undertakings in the territory. Surely it cannot be denied that if ever a territory required Statehood for the protection of the rights of her people and the encouragement of her material advancement, that territory is New Mexico?

DEPARTMENTAL INJUSTICE.

In order that you may the more fully understand the vital importance of Statehood as the only certain means of protecting the right of our citizens to use the waters of our streams, I would call your attention to another feature of the vicious attack the promoters of the "international dam" project have so long maintained against New Mexico.

On February 26, 1898, the Senate passed a resolution requesting the President:

"If not incompatible with the public interest, to transmit to the Senate the proceedings of the international commission authorized in the concurrent resolution of Congress of April twenty-ninth, eighteen hundred and ninety, and a subsequent international convention between the United States and Mexico of May sixth, eighteen hundred and ninety-six, and also the correspondence relating thereto with Mexico by the Department of the Interior, Department of War, and Department of Justice, as well as the Department of State, relating to the equitable distribution of the waters of the Rio

Grande River, including the draft of an incomplete treaty between said Governments, negotiated between the late Secretary of State, Mr. Olney, on the part of the United States and Mr. Romero on the part of Mexico, and all the correspondence between said officials relating thereto."

Now, on the face of it, this is a seemingly innocent request. But the resulting document (Senate Doc. No. 229, 55th Congress—second session) was anything but innocent.

From the wording of the Resolution, it may be inferred that the Senate desired all the information obtainable in the Departments touching the subject thereof, but this Resolution and the resulting Document, like the Concurrent Resolution first above mentioned and Mr. Stephens' bill, was inspired by the promoters of the "international dam" scheme; and in some mysterious way, Senate Document No. 229 as above was so manipulated during the process of its compilation that every paper inimical to the "international dam" project and to Mexico's claim was either suppressed as a whole, or quoted in a garbled form. Even Attorney General Harmon's opinion, an authoritative and definite official statement directly bearing on the subject, *was entirely omitted*.

It is no exaggeration to say that if General Anson Mills, and the attorneys of the Mexican Government, had been handed the files of the Departments, from which to compile a response to the Senate Resolution, they could not have produced a document more favorable to the "international dam" project and to the Mexican claim.

Attorney General Harmon, in his official statement of opinion relative to the rights of the people of New Mexico, uses this language:

"The rules, principles, and precedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States.

"The fact that there is not enough water in the Rio Grande for the use of the inhabitants of both countries for irrigation purposes does not give Mexico the right to subject the United States to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory. The recognition

of such a right is entirely inconsistent with the sovereignty of the United States over its national domain."

Naturally one would suppose that as the Attorney General had been called upon for an opinion in regard to the Rio Grande question, such opinion would have been included in Senate Document No. 229, even if it had necessitated the printing in small type of some of General Anson Mills's communications to the several departments.

But the document was desired for a specific and ulterior object; and the inclusion in it of Attorney General Harmon's opinion would not have suited the purpose of the gentlemen who secured the passage of the Resolution.

However, Senate Document No. 229 has served a purpose not contemplated by those responsible for the drafting of the Resolution or the compilation of the resulting document itself. It has materially helped to arouse the people of New Mexico to a proper appreciation of the danger of their position as wards of the Federal Government. The brazen omission of a dozen or more important papers that should have been included in Document No. 229 has opened the eyes of not a few Members of Congress to the real motive prompting bills purporting to provide for the "equitable distribution of the waters of the Rio Grande;" and, Gentlemen, I am moved to hope that it will also serve to convince you that more than either Arizona or Oklahoma, New Mexico stands in pressing need of early admission into the sisterhood of States.

Yours obediently,

NATHAN E. BOYD, M. D.

FEBRUARY 10, 1902.

“It is an important question of public policy whether to establish water rights to irrigate thousands of acres in the lower regions, or to establish the right to irrigate millions of acres above. That is the problem confronting us in the Valley of the Rio Grande. . . . Should it be declared that the waters of the upper region must flow to the lower region, it would cut off millions of acres that could be irrigated above, to supply a few thousand acres below. **So it is necessary for the ultimate development of that country that the people of Colorado be allowed to use the waters of that State, and that the people of the upper tributaries and upper valleys of New Mexico be permitted to use the waters there.**”—*Statement by Major J. W. Powell, Director of the U. S. Geological Survey, before the Committee on Irrigation, February 8, 1890.*

“The Government of the United States cannot interfere with the water of Colorado. . . . I find on the Calendar a bill to provide for the equitable distribution of the waters of the Rio Grande between the United States of America and the United States of Mexico; and I find in this bill a provision that prohibits the Territory of New Mexico from appropriating any more of the water in that Territory. . . . They very kindly left out Colorado, where this river rises . . . but I suppose we could legislate in that way for New Mexico.”—*Senator Teller, of Colorado, Senate, January 28, 1901.*

COGENT ARGUMENT FOR STATEHOOD

ATTEMPT TO DEPRIVE NEW MEXICO OF HER RIGHT
TO THE WATERS OF THE RIO GRANDE
AND ITS TRIBUTARIES.

RUIN FOR NEW MEXICO'S FARMERS.

PROPOSED TREATY WITH MEXICO.

[Translation.]

The Government of the United States of Mexico and the Government of the United States of America, wishing to put an end in a friendly and equitable manner to the controversy arising from the use in the State of Colorado and the Territory of New Mexico of the waters of the Rio Bravo del Norte and its tributaries, constituting the dividing line between the two countries from Paso del Norte to its mouth in the Gulf of Mexico, owing to which use the people living on its banks below Paso del Norte, who had a prior right to these waters from having used them in the irrigation of their lands for nearly four hundred years, have been deprived of them, as it appears that that part of the said river between El Paso and the Conchos River is left without water during several months of the year, and as the freshets occasion changes by avulsion and erosion, giving rise to frequent disputes and difficulties, have agreed, after considering the report of the special mixed commission appointed to investigate this subject and to suggest a fair settlement securing the mutual rights of the two countries interested, to conclude a convention for that purpose, and have appointed their respective plenipotentiaries:

The President of the United States of Mexico, by his envoy extraordinary and minister plenipotentiary at Washington; and

The President of the United States of America, by his Secretary of State;

Who, after showing each other their respective full powers, and

finding them in good and due form, have agreed upon the following articles:

ARTICLE I.

To attain the ends mentioned in the preamble to this convention, an international dam shall be constructed in the Rio Bravo del Norte within as short time as possible, not exceeding — years, about three miles above El Paso, fifteen miles long and about three and a half miles wide, in the manner and upon the conditions proposed by the mixed commission.

ARTICLE II.

In compensation for the damage suffered by Mexican citizens in consequence of the use of the waters of the Rio Bravo del Norte in the State of Colorado and the Territory of New Mexico, the Government of the United States of America will bear all the expenses necessary for the construction of the dam in the manner proposed in the opinion of the special commission, and will cede to the Government of Mexico the territory referred to in Article III of this convention.

ARTICLE III.

In order that the dam the construction of which is provided for by this convention may have a real international character—that is to say, that it may be constructed upon the dividing line between the two countries—the *United States of America agrees to cede to Mexico such territory as may be necessary*, which, according to the report of the special mixed commission, will not exceed 100 acres, in order that the southern side of the dam may be in Mexican territory.

The Government of the United States of Mexico will recognize and respect, in ceded territory, the rights granted by the Government of the United States of America to the Southern Pacific Railroad Company on that part of its track passing through the territory ceded.

ARTICLE IV.

The Government of the United States of Mexico will appoint such officer or agents as it may deem expedient to superintend the construction of the dam, in order that it may be in conformity with the provisions of this convention and the specifications of the work.

ARTICLE V.

Half of the water contained in the dam shall belong to each of the contracting parties, and each shall appoint a commissioner and such other employees as it may think necessary to arrange the equal

apportionment of the water, and to see that what is left, in case either or both the Governments do not consume the half belonging to them, is disposed of in such a way that the dam will be emptied and filled with regularity, and that, so far as possible, a uniform current will be maintained in the river, so as to prevent changes in its bed by erosion or avulsion. In doubtful cases, the decision of the two commissioners shall be regarded as binding upon both Governments unless one of them shall disapprove it within one month, in which case the two Governments shall take cognizance of the matter themselves, and decide it amicably in such manner as shall appear to them just and expedient.

The same course shall be adopted when the commissioners disagree as to the point causing the doubt or dispute, in which case each commissioner shall draw up his opinion in writing and present it to his own Government.

ARTICLE VI.

To prevent new appropriations of water which might still more diminish the volume of the Rio Bravo del Norte (Rio Grande) hereafter, and thereby prevent the passage of the water necessary to fill the dam to which this convention refers, the Government of the United States of America binds itself to issue the necessary regulations, and to apply, if necessary, to the Congress of the United States of America for legislation to *prevent the construction of new works or canals on the Rio Bravo del Norte and its tributaries*, on that part passing through the territory of the United States of America, or, if they are constructed, to prevent the volume of water being diminished to such an extent that it will not supply the dam, and to institute prompt and efficacious legal proceedings to prevent the violation of the provisions of this convention.

ARTICLE VII.

The two Governments shall appoint a mixed commission of engineers to lay off the dividing line in accordance with the provisions of Article III of this convention, and the line run by that commission shall be regarded hereafter as the dividing line between the two countries.

ARTICLE VIII.

In compensation for the expenses which the Government of the United States of America has to undergo in the construction of the dam, and in consideration of the cession of territory referred to in Article III of this convention, the Government of the United States of Mexico regards as satisfied all claims of Mexican citizens against the Government of the United States of America arising from the want of water in the Rio Bravo del Norte caused by the taking of

water in the State of Colorado and the Territory of New Mexico, and expects no indemnity for such damage.

ARTICLE IX.

The present convention shall be ratified by the two parties in accordance with their respective constitutional procedure, and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof the undersigned plenipotentiaries have signed and sealed the same.

Done in duplicate in the city of Washington, in the Spanish and English languages, this — day of —, —.

BILL TO PREVENT IRRIGATION IN NEW MEXICO.

57TH CONGRESS, 1ST SESSION.

S. 453.

H. R. 115.

December 4, 1901.—Mr. Culberson, of Texas, introduced the following bill in the Senate; which was read twice and referred to the Committee on Foreign Relations.

December 2, 1901.—Mr. Stephens, of Texas, introduced the following bill in the House of Representatives; which was referred to the Committee on Foreign Affairs, and ordered to be printed.

A BILL

To provide for the equitable distribution of the waters of the Rio Grande River between the United States of America and the United States of Mexico, and for the purpose of building an international dam and reservoir on said river at El Paso, Tex.

Whereas the Republic of Mexico has made reclamation of the United States to the Secretary of State, through its legation in Washington, for a large indemnity for water alleged to have been taken and used by the citizens of the United States in Colorado and New Mexico, on the head waters of the Rio Grande, to which citizens of Mexico had right by prior appropriation, in violation of the spirit of article seven of the treaty of peace of Guadalupe Hidalgo; and

Whereas an investigation directed jointly by the State Departments of the two Republics and carried out by the International Boundary Commission organized under the convention of March first, eighteen hundred and eighty-nine, discovered the fact that the flow of the river has gradually diminished for the past fifteen years in an increasing ratio, so that the ordinary summer's flow in the lower river is inadequate to supply the wants of irrigation, domestic, and other purposes, as has been supplied in previous years; and

Whereas a remedy has been proposed by the two Governments for this deficiency by impounding in an international dam and reservoir, near the boundary line between the two Republics, the annual flood waters of the spring season, which are greatly in excess of the wants of irrigation, domestic, and other purposes in those seasons, such waters to be equitably distributed between the two Republics; and

Whereas it was afterwards discovered that other like projects of large dams and reservoirs were contemplated above said proposed international dam and reservoir; and

Whereas the two Governments jointly directed the International Boundary Commission hereinbefore mentioned to investigate and report upon the feasibility of the project; and

Whereas said commission reported that, in their judgment, the project was feasible, but that the flow was insufficient for more than one reservoir; and

Whereas the two Governments were unable to agree upon the construction of said proposed international dam and reservoir until some method of restraining the building and use of other dams and reservoirs which would destroy the usefulness of said proposed international dam and reservoir has been devised: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That nothing in the acts of March third, eighteen hundred and ninety-one, January twenty-first, eighteen hundred and ninety-five, February twenty-sixth, eighteen hundred and ninety-seven, and May eleventh, eighteen hundred and ninety-eight, shall be so construed as to authorize the appropriation and storage of the waters of the Rio Grande or its tributaries in the Territory of New Mexico to which others have right by prior appropriation; and every person and every corporation which shall be guilty of thus unlawfully appropriating and storing said waters in this act mentioned shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars or by imprisonment (in the

case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. The unlawful appropriating and storing of water in this act mentioned may be prevented, and the dam, reservoir, or other means used for impounding the water may be removed by the injunction of any circuit court exercising jurisdiction in any district in which said water may be appropriated or stored, and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States.

SEC. 2. That the Secretary of State is hereby authorized to proceed with the consummation of the proposed treaty between the United States of America and the United States of Mexico, and if the United States of Mexico shall accept the construction of the proposed dam and reservoir, with the conditions that the flood water impounded by it shall be equally distributed between the two countries as liquidation of all past and future claims for water appropriated in the past or to be appropriated in the future by citizens of the United States otherwise than by impounding it in large dams and reservoirs in New Mexico, then the Secretary of State is further authorized to proceed with the construction of said dam and reservoir according to the plans and specifications submitted in the report of the International Boundary Commission, as published in Senate Document Numbered Two hundred and twenty-nine, Fifty-fifth Congress, second session, and the sum of two million three hundred and seventeen thousand one hundred and thirteen dollars and thirty-six cents is hereby appropriated for that purpose.

APPENDIX.

ABSTRACTS

FROM THE DECISIONS

OF THE

SUPREME COURT OF NEW MEXICO

IN

THE ELEPHANT BUTTE DAM CASE,

WITH CITATIONS FROM THE LAWS OF THE UNITED STATES CONCERNING
THE USE OF THE WATERS OF THE ARID REGIONS
FOR IRRIGATION PURPOSES.

SUPREME COURT OF NEW MEXICO,

JULY TERM, 1897.

THE UNITED STATES (<i>Appellant</i>),	} No. 753.
<i>v.</i>	
THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL. (<i>Appellees</i>).	

Appeal from the Third Judicial District Court.

“This is a suit in equity brought by the United States to restrain the Rio Grande Dam and Irrigation Company from constructing or maintaining a dam across the Rio Grande, at Elephant Butte in the Territory of New Mexico. . . .

“The ground upon which the claim of the Government is predicated is that the Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity; and that such obstructions would be contrary to the treaty with Mexico, and in violation of the Acts of Congress.

"A preliminary injunction was granted, and the defendants ordered to show cause why it should not be continued. The Defendants answered denying that the Rio Grande is a navigable river; and also filed pleas justifying, under their right of way for canals and reservoirs secured under the Act of Congress of 1891 and certain Territorial laws.

"Upon the hearing, the Court below held that upon the facts presented by affidavit, as well as other facts of which it took judicial notice, the Rio Grande is not a navigable stream within the Territory of New Mexico, and that the bill does not state a case entitling it to the relief prayed: and upon the Complainant's declining to amend its bill further, the Court dissolved the injunction and dismissed the bill. From that judgment, the United States appealed to this Court. . . .

"Unless the Rio Grande is a navigable stream, and its 'navigation' or 'navigable capacity' will be obstructed by the proposed dam, the statutes do not apply to the case, and cannot be invoked to enable the Government to stop the progress of the work by injunction.

"It is alleged, in the original bill, that the Rio Grande, from and including the site of the proposed dam, has been used to float logs for commercial and business purposes, and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of Mexico. In the amended bill, it is alleged that the said river is susceptible of navigation for commercial purposes up to La Joya in the Territory of New Mexico, about one hundred miles above Elephant Butte. In both, the river is alleged to be navigable at certain points below El Paso.

"It is conceded that the navigability of waters is a matter of which Courts take judicial notice. The record contains a large mass of information in the form of maps, reports of exploring and surveying expeditions made under the direction of the War and Interior Departments, and also reports of officers specially detailed to investigate the feasibility of rendering the river commercially navigable by improvements, and also its capability of supplying reservoirs for irrigation. From these and other data, the following facts, as stated in the opinion of the Court below, are well established. . . .

"The course of the Rio Grande in New Mexico is through rocky cañons and . . . valleys over fine, light soil of great depth. . . . only two instances were shown where the river was actually

utilized for the conveyance of merchandise, and these were timbers ; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of twelve miles ; and the other recently, when some telegraph poles were floated from La Joya, a 'short distance.' . . .

'From Bernalillo (N. M.) to Fort Hancock (Texas) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it.' (10 Annual Report Geol. Sur. p. 99.)

'From personal observation, I know that these seasons of flood and drought (in the Valley of the Rio Grande) were of about the same character 30 years ago.' (Major Anson Mills 10 U. S. Cav., Rep. Spec. Com. Sen. Vols. 3 and 4 p. 39.)

"But what is of more importance, we have the reports of officials upon the exploration of the river made under the direction of the Government for the special purpose of considering its navigability. From these it appears that:

'The stream is not navigable, and it cannot be made so by open channel improvement. . . . Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are most deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment, the stream is not worthy of improvement by the General Government.' (Report of O. H. Ernst, Major of Engineers, to Secretary of War, 1889.)

"Again :

'I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. During the greatest part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal with locks, the construction of which, on a foundation of sand in places forty-six feet deep, would be financially, if not physically, impracticable.' (Report of Gerald Bagnell, Assistant Engineer to Secretary of War, 1889.)

"The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditure

of vast sums of money, but upon its natural present conditions. In the case of the *Daniel Ball*, 10 Wallace, 557, the Supreme Court says :

‘Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used, in the ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water.’

“In the case of the *Montello*, 20 Wallace, 431, the Court says :

‘If it be capable, in its natural state, of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact, and becomes a public highway. The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce.’

“The Court approves the language of Chief Justice Shaw in 21 Pickering, 344, who said :

‘In order to give it the character of a navigable stream, it must be generally and commonly useful to some trade or agriculture.’ (See also *Morrison v. Coleman* (Ala.) 3 L. R. A., 344.)

“Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs or even thin boards may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. Angell, *Water Courses*, 335. In a recent case, the Supreme Court of Oregon says, per Thayer, C. J. :

‘Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation.’

“And in the same case Lord, J., said :

‘ It must be susceptible of beneficial use to the public,’ be ‘ capable of such floatage as is of practical utility and benefit to the public as a highway.’

“And of the stream then in question he says :

‘ It is not only not adapted to public use, but the public have made no attempt to use it for any purpose.’ (Haines v. Hall (Oregon) 3 L. R. A., 609.)

“The Supreme Court of Alabama says :

‘ In determining the character of a stream, inquiry should be made as to the following points : whether it be fitted for valuable floatage : whether the public or only a few individuals are interested in transportation ; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use, beneficially, to the public.’ (Roads v. Otis, 33 Ala., 578 ; Peters v. N. O., M. & G. R. Co., 56 Ala., 532.)

“Indeed, in the letter of inquiry by the Hon. Richard Olney, Secretary of State, in respect to the facts as to the navigability of the Rio Grande, he says :

‘ It should be remembered that a mere capacity to float a log or a boat will not alone make a river navigable. The question is, whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the River to Ciudad Juarez in flat boats, and that logs are rafted or floated down from the timbered lands on the upper river for commercial purposes.’ (Letter January 4, 1897.)

“The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, *at whose request it appears that application for right of way for irrigation by the use of the waters of the Rio Grande and all its tributaries, was suspended throughout New Mexico and Colorado.* The answer of Col. Mills deals almost wholly with the river internationally ; the river, in its relation to interstate commerce, is dismissed by him with the instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark ‘ it would now hardly be practicable to do so.’ (Letter January 7, 1897.)

“It is particularly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse, in any manner whatever, and that it is not now capable of being so

used. On the other hand it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. The Valley has always been the centre of population in New Mexico. It was the first portion of this region to be occupied and settled by civilized man; and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly 200 years, by which the river has been obstructed and its waters diverted for irrigation to both sides of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by any one as to interference with any use of the river for purposes of navigation. Indeed, it appears *from the affidavits and reports presented in support of the bill in this case, that the objection now raised to the construction of the Defendant's dam grows out of the proposed construction of an international dam and reservoir at El Paso*, to be constructed under the auspices of the two Governments. The investigation of the feasibility of such an international dam and reservoir is being made on behalf of the United States under the authority of Congress, thus *evinced the deliberate intention of the Government by its political department* to take measures, not for the purpose of improving the navigability of this river, but of *permanently obstructing it* at a point far below the site of Defendant's works, and thus to devote the stream to irrigation instead of navigation. One of the affidavits in support of the bill is made by the Commissioner of the United States engaged upon this investigation, the object of which he states to be 'the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on the banks or tributaries, having equitable interests therein.' And he also states in one of his reports that 'the probably flow of water in the river here (El Paso) is likely to be ample for the supply of the proposed International reservoir, but that the flow will not be sufficient to supply the proposed International reservoir here, and allow for the supply for the proposed reservoir of the Rio Grande Dam and Irrigation Company, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out.'

"That is to say, in order to render feasible the storage of water for irrigation at El Paso, it is essential to prohibit all similar structures along the river at points above.

“ From these extracts, it seems clearly apparent that the work at El Paso to which the United States has committed itself, tentatively at least, is not designed to preserve or improve the navigability of the river, but to facilitate the distribution of the waters which may be gathered by obstructing the stream for the benefit of riparian occupants; and that the object of this proceeding is not to secure a public benefit from the navigation of the Rio Grande, but rather, *under the guise of a question of navigability of the stream, to obtain an adjudication of the interests of rival irrigation schemes*, in aid of one locality against another. Manifestly, neither the Acts of Congress cited, nor the provisions of the treaty, have any application to questions of this kind; and they cannot be invoked to settle conflicting local interests whose determination must necessarily depend upon entirely different considerations.

“ The Rio Grande, as we have said, flows through a region dependent upon irrigation. It is a part of what is known as the arid region of this country, embracing, according to the report of the Director of the Geological Survey, about four-tenths of the entire area of the United States in which the rainfall is not sufficient for the production of crops. Here, the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads. . . . But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region; and if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity. These conditions have been distinctly recognized in the legislation of Congress. For while it has refrained from any attempt to render streams like the Rio Grande navigable by artificial works, and has not in any way treated them as navigable waters, Congress has, by the reservation or survey of reservoir sites along its valley, and the appropriation of large sums of money for the prosecution of investigations and surveys to this end, clearly indicated its purpose to treat these waters as suitable only for irrigation, and to consider such a use of them as the one of commanding importance.

“The riparian rights of the United States were surrendered in 1866 (R. S. 2339): prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far west and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriations of waters by the Act above mentioned, where the same ‘are recognized and acknowledged by the local customs, laws and decisions of the Courts.’ (Sec. 3339.) The Supreme Court of the United States, in passing upon this Act, observes:

‘It is evident that Congress intended, although the language is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition.’ (*Atchison v. Peterson*, 20 Wal., 507; *Basey v. Gallagher*, 20 Wal., 671. And since 1870, patents for lands expressly except vested water rights.)

“Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region, under local regulative control. Following in line with the Act of 1866, the Act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them.

“This act was limited to States and Territories in the arid region (1 Supp. R. S., p. 137). Colorado was included in 1891 (1 Supp. R. S., pp. 249–251). By the Act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs for the storage and utilization of water for irrigation and the prevention of overflows, and that the lands designated for reservoirs, ditches or canals, and all lands susceptible for irrigation therefrom be reserved from sale or entry (1 Supp. R. S., p. 698). . . . On the 26th day of February, 1897, Congress opened the reservoir sites, reserved by the Government under the Act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges. (Decision Interior Department, Vol. 18, p. 168.)

“Considering the discussions in Congress, the reports of Committees, and the labors and reports of officials in the Interior and War Departments, made under congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region, had become the recognized policy. . . . It would appear that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least; and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed and established along the streams, navigable and non-navigable, under the immediate direction of Government officials and by authority of Congress; and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

“Ruins of extensive irrigation systems of a prehistoric people, scattered all over New Mexico and Arizona, show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande Valley by acequias from the river is mentioned by the earliest Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that ‘the laws heretofore in force, concerning water courses . . . shall continue in force.’ . . . In 1874, it was provided that—

‘All of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias and to take water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass, a just compensation for the land used.’ (C. L., Sec. 17.)

“In 1887, an Act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. (Session Acts, 1887, Chap. 12.) Other Acts have been passed since in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico;

its general characteristics are common throughout the West, where the doctrine of prior appropriation prevails. Thus was the character of local legislation, which Congress recognized, confirmed and authorized, by the various Acts to which reference has been made. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom and judicial decision. Indeed, it is no figure of speech to say that the agriculture and mining life of the whole country depends upon the use of the waters for irrigation; and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande Valley in New Mexico.

"It is contended that because the Rio Grande is capable of navigation to a limited extent, several hundred miles below the point of the proposed dam, its construction will, by arresting the flow of water in the stream, interfere with its navigable capacity, and that it is therefore prohibited by the act of 1890. From the foregoing discussion of the legislation of Congress, and the conditions prevailing in the region under consideration, it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande, that of the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they cannot be said to be waters in respect of which the United States has jurisdiction. And certainly in the absence of some express declaration to that effect, it cannot be supposed that Congress intended to strike down and destroy the most important resources of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth. For the construction contended for does not limit the prohibition of the Act of Congress to the works proposed by the defendants. It applies to the maintenance as well as the original creation of obstructions. If Defendants' dam at a point where the river is not navigable is an obstruction to the navigable capacity of the river several hundred miles below, the same must be said of every dam and irrigation ditch which diverts water from the river or any of its confluent at their primary sources. If upon this ground it is competent for the United States to prohibit the erection of Defendants' Dam, it is equally competent for it to compel the removal of every dam and

headgate heretofore constructed on the Rio Grande and its tributaries, and prohibit the use of their waters for irrigation throughout this entire valley. . . .

“ In view of the condition and history of the region which would be affected ; the unimportance of the Rio Grande as a waterway for commercial intercourse at any point ; its non-navigability at the place of the proposed construction, and for hundreds of miles below ; and the evident purpose of Congress by its legislation to promote irrigation throughout this portion of the country, even to the extent of further obstructions of this very stream, it would in our opinion be unreasonable to hold that legislation, which has a definite and well-understood purpose in furtherance of the public interest in these portions of the country to whose conditions it is applicable, was intended to operate to the detriment of the public interests, in regions to whose conditions it is not applicable and where its enforcement would be destructive of the very interests which the legislation of Congress has otherwise undertaken to promote.

“ We therefore hold that the work sought to be enjoined in this action is not in violation of any law of the United States, or any treaty, and that the judgment of the District Court dissolving the injunction and dismissing the bill should be affirmed, and it is so ordered.”

(Signed)

THOMAS SMITH,
Chief Justice.

“ I concur in the conclusion reached : ”

(Signed)

N. B. HAMILTON, *A. J.*
N. B. LAUGHLIN, *A. J.*

LAWS OF THE UNITED STATES RELATING TO THE USE OF WATER FOR IRRIGATION.

Prior to 1866, various States and Territories west of the Mississippi had enacted laws regulating the use of waters in the streams and lakes for mining and agricultural purposes. All these laws were based on the theory that the first appropriator was entitled to the water, or so much as was necessary for his purposes. The following statutes of the United States directly affirm this State and Territorial legislation, and encourage the use of the waters for such purposes, and especially for the purpose of irrigation :

SEC. 2339. "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (*Rev. St.*, 429.)

SEC. 2340. "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

19th Statute, 377 (Sup. 2d Ed., 137, 1887). "An act to provide for the sale of desert lands," &c., which, after providing in the first section a method by which said lands might be filed upon, and water conducted upon the same for irrigation purposes, there follows this proviso:—

"Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

This Statute was specifically made applicable to California, Oregon, Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota. Afterwards, in 1891, it was made applicable to Colorado. (Sup. 2d Ed., 941.)

25th Statute, 526. Congress in the Sundry Civil Bill provided for the survey of reservoirs and canal sites, and for reserving from sale all such sites, and all lands that would be watered by such reservoirs, and appropriated \$100,000 therefor. Also see Sup. 2d Ed., 626.

25th Statute, 960. Congress again provided in the Sundry Civil Bill for investigating the extent to which the arid region of the U. S. can be redeemed by irrigation, and the segregation of irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation, and made an appropriation of \$250,000 to pay the expenses.

26th Statute, 391. Here Congress again, in the Sundry Civil Bill, legislated with reference to the question of irrigation, and repealed the act providing for the withdrawal from entry of lands in the vicinity of reservoir sites, except that the reservoir sites themselves, theretofore located or selected, should remain segregated and reserved from entry or settlement, as provided by law, and reservoir sites thereafter located or selected on public lands should in like manner be reserved from the date of location or selection thereof.

26th Statute, 1101. Congress restricted the reserves about reservoir sites to the land necessary for the reservoirs.

28th Statute, 422-'3. Appropriates desert lands to the various States and Territories on certain conditions of reclaiming the same by irrigation, the aggregate amount not exceeding 1,000,000 acres, being Section 4 of the Sundry Civil Bill of August 18, 1894.

28th Statute, 635-'6. This is an act authorizing the use of public lands for reservoirs and canals, giving 50 feet on either side of the same.

29th Statute, 484. An act providing for reservoirs on the public lands by persons or corporations engaged in breeding live stock, &c.; reservoirs not to exceed 160 acres.

29th Statute, 599. All reserved reservoir sites are by this act thrown open to appropriation by individuals, corporations, and States, under the act of March 3, 1891, limited by the following proviso.

“Provided, that the charge of water coming in whole or part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulations of the respective States and Territories in which such reservoirs are in whole or in part situate.”



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